

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

2, 3 & 4 EAP 2023

**LARRY KRASNER, in his official capacity as the District Attorney
of Philadelphia,**

v.

**SENATOR KIM WARD, in her official capacity as Interim
President Pro Tempore of the Senate, REPRESENTATIVE
TIMOTHY R. BONNER, in his official capacity as an
impeachment manager; REPRESENTATIVE CRAIG WILLIAMS,
in his official capacity as an impeachment manager;
REPRESENTATIVE JARED SOLOMON, in his official capacity as
an impeachment manager; SENATOR JAY COSTA, in his official
capacity as Minority Leader of the Senate; and JOHN DOES, in
their official capacities as members of the SENATE
IMPEACHMENT COMMITTEE APPEAL OF: REPRESENTATIVE
TIMOTHY R. BONNER and REPRESENTATIVE CRAIG
WILLIAMS**

**APPLICATION OF APPELLANT DISTRICT ATTORNEY LARRY
KRASNER FOR DISQUALIFICATION
OF JUSTICE P. KEVIN BROBSON**

Appellant District Attorney Larry Krasner (“Applicant”) requests the entry of an Order disqualifying Justice P. Kevin Brobson from any further participation in this appeal. In support, Applicant respectfully states as follows:

1. This Honorable Court heard oral argument in these consolidated appeals on November 28, 2023. On December 4, 2023, six

days following the argument, Justice Brobson sent all counsel a letter stating: (a) he “was not previously aware of [Attorney Robert A. Graci’s] involvement in this case”, who argued this appeal on behalf of Respondents Representatives Timothy R. Bonner and Craig Williams, because Mr. Graci’s name did not appear on the briefs for the parties; (b) Mr. Graci represented Justice Brobson in a “personal” matter that lasted 6 months, concluding in June 2022; and (c) Mr. Graci had served as treasurer for Justice Brobson’s campaign committee for the Pennsylvania Supreme Court election in 2021. A copy of the letter is attached as Exhibit 1.

2. Justice Brobson’s letter further states that he “intend[s] to participate in the consideration and decision of the [appeals] impartially and objectively”, though “should any party wish to file a timely motion” in light of his disclosure, he “will afford it appropriate consideration.” *Id.*

3. Applicant files this Application because Justice Brobson’s impartiality to decide these consolidated appeals might reasonably be questioned and his disqualification is therefore required.

I. BACKGROUND

4. Respondents Bonner and Williams, as well as Respondent Senator Kim Ward, are designated Appellees in these appeals.

Representatives Bonner and Williams filed a Notice of Appeal from the

Commonwealth Court on January 26, 2023. Senator Ward's Notice of Appeal was docketed on February 9, 2023.

5. Representatives Bonner and Williams are represented by the law firm Saxton & Stump. That firm filed merits briefs on Representatives Bonner and Williams' behalf on July 25, 2023 and September 14, 2023.

6. On October 10, 2023, Robert A. Graci, Esquire, also of Saxton & Stump, entered his appearance on behalf of Representatives Bonner and Williams. A copy of the Entry of Appearance is attached as Exhibit 2.

7. Also on October 10, Mr. Graci filed a Notice stating that he intended to present oral argument on behalf of Representatives Bonner and Williams. A copy of Mr. Graci's Acknowledgment of Argument Notice is attached as Exhibit 3.

8. On the morning of November 28, 2023, Mr. Graci was physically present and seated ready to argue, before it commenced at 9:30 am. Also, like the three other arguing counsel, he advised the Court crier that he was arguing on behalf of Representatives Bonner and Williams.

9. Neither Justice Brobson nor Mr. Graci made the disclosures identified in his letter – or any other disclosures of any ties or connections between them – at the argument.

10. The December 4 disclosure letter was six days after the November 28 argument and fifty-five days after Mr. Graci had entered his appearance and advised the Court that he intended to argue on behalf of Representatives Bonner and Williams.

II. JUSTICE BROBSON SHOULD BE DISQUALIFIED FROM THESE PROCEEDINGS

A. Standards for Disqualification

11. The Pennsylvania Code of Judicial Conduct obligates judicial officers to “promote[] public confidence in the independence, integrity, and impartiality of the judiciary, and [they] shall avoid impropriety and the appearance of impropriety.” Pa. Code of Judicial Conduct (CJC), R. 1.2. A judicial officer—including a Justice of the Supreme Court—“*shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.*” CJC, R. 2.11(A) (emphases added).

12. Judicial impartiality is a bedrock principle of the fair administration of justice. “A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice”, *id.* R. 2.3(A), and must discharge those duties “impartially, competently, and diligently”, *id.* Canon 2.

13. It is so important a principle that a judge must additionally avoid even “an appearance of bias or prejudice” or “conduct that may

reasonably be perceived as prejudiced or biased.” *Id.* R. 2.3, cmt. 2. *See also In the Interest of McFall*, 617 A.2d 707, 713 (Pa. 1992) (“[A]ny tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.”) (quoting *Horn v. Township of Hilltown*, 337 A.2d 858, 859-60 (Pa. 1975)); *Commonwealth v. Druce*, 796 A.2d 321, 327 (Pa. Super. Ct. 2002) (“The inquiry is ... whether, even if actual bias or prejudice is lacking, the conduct or statement of the court raises an appearance of impropriety.”), *aff’d*, 848 A.2d 104 (Pa. 2004) (quotations omitted); *see also Joseph v. Scranton Times L.P.*, 987 A.2d 633, 636 (Pa. 2009) (per curiam).

14. Adherence to the Canons is essential to “public confidence in the administration of justice,” as “[t]he appearance of bias or prejudice can be as damaging” “as would be the actual presence of either of these elements.” *McFall*, 617 A.2d at 713. “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges,” and a failure to properly disqualify risks “undermin[ing] the legitimacy of [this] Court.” *Commonwealth v. Reid*, 235 A.3d 1124, 1171 (Pa. 2020) (Donohue, J., dissenting) (citing *Matter of Glancey*, 527 A.2d 997, 999 (Pa. 1987)).

15. Pennsylvania courts have found an appearance of partiality where a movant alleges conduct or statements from which “a significant

minority of the lay community could reasonably question the court's impartiality." *Commonwealth v. Darush*, 459 A.2d 727, 732 (Pa. 1983); *Commonwealth v. Stevenson*, 829 A.2d 701, 705 (Pa. Super Ct. 2003); *Commonwealth v. Watson*, 228 A.3d 928, 940 (Pa. Super. Ct. 2020).

16. Our research has uncovered no authorities addressing whether the Pennsylvania Canons of Judicial Conduct call for the disqualification of a judge where, as here, a party's counsel has recently represented the judge in a personal matter.¹ The decisions from several other jurisdictions (Florida, New York, and Washington) support disqualification.²

¹ In *Reilly by Reilly v. Se. Pennsylvania Transp. Auth.*, 479 A.2d 973 (Pa. Super. Ct. 1984), the Superior Court concluded that a trial judge was not required to recuse himself in a matter in which trial counsel had previously represented the trial judge as one of many members of a class action, not in a personal matter. Here, in contrast, the disclosure expressly provides that Mr. Graci represented Justice Brobson in a "personal" matter, not merely as a member of a class. The Superior Court further opined "perhaps sometimes an attorney's past representation of a judge will be enough by itself to create such an appearance of impropriety..." *Id.* at 979.

² See *Ballard v. Campbell*, 127 So. 3d 693, 695 (Fla. Dist. Ct. App. 2013) ("The general rule is that disqualification is required if counsel for one of the parties is representing or has recently represented the judge."); N.Y. Judicial Ethics Op. 23-44 ("[A] judge must continue to disqualify him/herself for a period of two years whenever the attorney who represented him/her . . . appears in the judge's court."), <https://nycourts.gov/legacyhtm/ip/judicialethics/opinions/23-44.htm>; Washington Ethics Adv. Comm. Op. 89-13 ("This restriction shall apply while the lawsuit is pending or for a reasonable period of time after its termination."), https://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dis

Additionally, ethics opinions and case law, respectively, from Arizona and Minnesota appear to apply a broader circumstances test that may well support disqualification.³

[popin&mode=8913](#); see also Utah Judicial Ethics Informal Op. 00-4 (“A judge must therefore enter disqualification . . . for six months after the representation has ended.”) (“[T]hose decisions which state that disqualification is not necessary after the representation has ended typically result from facts involving law suits in the judge’s official capacity.”), https://www.utcourts.gov/en/court-records-publications/publications/judicial-ethics-opinions/ethics-opinions/2000/00-4.html#N_2.

³ See Arizona Judicial Ethics Adv. Op. 02–5 (noting that once the representation terminates, the judge should consider “the nature and extent of the prior litigation, whether the judge was personally involved in the matter as it progressed, and whether he or she shared any confidential information with the [attorney] that might give that attorney an advantage when appearing before him or her in the future”), https://www.azcourts.gov/portals/137/ethics_opinions/2002/02-05.pdf; *Powell v. Anderson*, 660 N.W.2d 107, 118 (Minn. 2003) (reviewing court should apply multi-factor test considering “the extent of the attorney-client relationship”, “the nature of the representation”, “the frequency, volume and quality of contacts between the judge and the attorney”, and “any special circumstances that might either enhance or limit (1) the importance of the attorney or firm to the judge and/or (2) the appearance of impropriety to the public”).

A more than two-decades old summary of decisions regarding these issues appears at Cynthia Gray, *Disqualification: Judge’s Attorney Appears in Case*, Judicial Conduct Reporter, 24 No. 3 JCR 1 (Fall 2002).

**B. Justice Brobson's Disclosures and Other
Known Circumstances Require His
Disqualification**

17. First, Mr. Graci's recent, six-month representation of Justice Brobson is a fully sufficient basis for disqualification. Justice Brobson's "impartiality might reasonably be questioned" because of the special trust and dependence attendant to the lawyer-client relationship. The fair inference to observers is that the lawyers arguing on behalf of Applicant and the Applicant himself do not stand on equal footing with Mr. Graci and his clients. This is precisely the kind of appearance where Justice Brobson's impartiality might reasonably be questioned, requiring his disqualification and recusal.

18. The disclosure letter was also not complete in that it does not (a) describe the subject matter(s) of Mr. Graci's representation other than to say that it was for a "personal" matter; or (b) state whether Mr. Graci handled the representation on a pro bono, discounted, or full fee basis; and, if a fee was paid, how much.

19. This incompleteness further counsels disqualification because it does not allow Applicant and public to know of any relationship between the subject matter of Mr. Graci's legal advice and those raised in these appeals. For example, Mr. Graci concentrates his practice on attorney and

judicial ethics matters and three of the challenged Amended Articles of Impeachment allege violations of the Canons of Judicial Conduct and Rules of Professional Conduct. See <https://www.saxtonstump.com/what-we-do/attorney-and-judicial-ethics-and-discipline/>; Amended Articles III, IV, and V (R.117a-R.126a).⁴

20. The client who has come to depend upon his lawyer's advice on ethical and professional responsibility matters should not, a year and a half later, be a Justice who is considering the strength and weakness of that same lawyer's arguments on ethical and professional responsibility matters. So, any overlap in the subject matter of the representation and these appeals would enhance the appearance that the Justice is not impartial.

⁴ The timing of Mr. Graci's representation of Justice Brobson (i.e., 6 months ending in June 2022) appears to coincide with reported allegations by the Pennsylvania Bar Association that an advertisement by Justice Brobson's 2021 campaign violated standards of accuracy and integrity in campaign advertising. See Andrew Seidman, *Pa. Bar Association Criticizes TV Ad by GOP Candidate for State Supreme Court*, PHILA. INQUIRER (Oct. 24, 2021), <https://www.inquirer.com/politics/pennsylvania/pa-supreme-court-election-kevin-brobson-maria-mclaughlin-advertising-20211026.html>.

To be clear, Applicant does not know whether this is the representation that the December 4 letter is alluding to. If this Application is not granted or Justice Brobson does not recuse in the first instance, Applicant requests that the disclosure be supplemented to describe the matter and the fee arrangement in the representation.

21. Second, Mr. Graci served as the Treasurer of Justice Brobson's recent 2021 election campaign for the Supreme Court. That was a central and important position in Justice Brobson's campaign.

22. Under Pennsylvania law, the Treasurer – not the judicial candidate – raises money for the candidate by soliciting donations and coordinating others who are raising election funds. See CJC, R. 4.1(7); 25 P.S. § 3242(a). In that role Mr. Graci presumably expended substantial time to review all filings, answer questions from the campaign and the candidate, and to fulfill numerous other obligations.

23. Either of the above two reasons is more than ample basis for disqualification. Together they make that conclusion ineluctable.

24. Two additional considerations further reinforce this conclusion.

25. For one, there is the timing of the December 4 disclosure. Although it states that the Justice was not aware in advance of the argument, Mr. Graci was sitting in the Courtroom waiting to argue the morning of the argument before it started.

26. Disclosure could thus have been made before the argument commenced yet it was not done until six days later.

27. The perception of partiality is further enhanced because Justice Brobson more actively questioned counsel for Applicant and Intervenor

Senator Jay Costa (who, like District Attorney Krasner, seeks reversal of the Commonwealth Court's order on Count I of the Petition for Review) than Mr. Graci and counsel for the other Appellee. A review of the audio and video of the argument reveals that Justice Brobson (a) questioned counsel for District Attorney Krasner and Senator Costa approximately three times more than he questioned counsel for Respondents (including Mr. Graci), whether measured by number of questions or the amount of time for the questions and answers to his questions; and (b) the preponderance of his questions supported Mr. Graci's (and the other Appellee counsel's) position that District Attorney Krasner's claims were not justiciable.

28. Additionally, the delay in the disclosure further contributes to the perception of partiality because disclosure may have been made after the Justices' internal Supreme Court deliberations and tentative vote on the merits of the appeal. *See* 210 Pa. Code § 63.3(A)(3) ("Each day following oral argument the Court shall meet in conference to discuss the cases argued that day. The Chief Justice shall preside at the conference, lead the Court's discussion, and call for a tentative vote on the decision of each case."). To be clear, Applicant does not know when any disclosure was made to the other Justices; instead, the point is that on the present public record, there is likely a perception of partiality.

29. A final consideration also supports disqualification and recusal: as all of the parties acknowledge, these appeals raise matters of high public importance and interest. This case goes to the heart of democracy and the effort to erase the votes of the overwhelming majority that re-elected DA Krasner, including the votes of ordinary and marginalized Americans. Thus, the public needs to know that the important issues to be decided in these appeals will be decided impartially. Among other things, the appeals (a) raise many first impression issues concerning Article VI, Section 6 impeachment and Article II *sine die* principles; (b) concern the Supreme Court's role as one of three branches of government empowered to place constitutional guardrails on the General Assembly's exercise of its impeachment powers; and (c) challenge an impeachment effort that, in effect, seeks to nullify the re-election of the chief law enforcement official of Philadelphia, the largest city in the Commonwealth.

30. This Honorable Court always has the strongest institutional interest in being – and making clear to the public – that it is a reasoned, independent, apolitical body, composed of Justices who comply with the highest ethical standards. In as public a matter as this one, this institutional interest is even stronger. It is thus particularly important in

these appeals that each Justice hew closely to his or her ethical obligations by not allowing any appearance of impartiality.

WHEREFORE, District Attorney Krasner's application for the disqualification of Justice P. Kevin Brobson should be granted.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: December 12, 2023

By: /s/ John S. Summers
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Matthew A. Hamermesh
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*Counsel for Appellant Larry Krasner, in his
official capacity as the District Attorney of
Philadelphia*

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

In compliance with Pennsylvania Rule of Appellate Procedure 127, I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: December 12, 2023

/s/ John S. Summers
John S. Summers

CERTIFICATE OF SERVICE

I, John S. Summers, hereby certify that on this 12th day of December, 2023, I am serving the foregoing Application of Appellant District Attorney Larry Krasner for Disqualification of Justice P. Kevin Brobson upon the following persons by the Court's electronic filing service, which service satisfies the requirements of Pa. R. App. P. 121:

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Joshua J. Voss, Esquire
Shohin H. Vance, Esquire
Samantha G. Zimmer, Esquire
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*Counsel for Intervenor
Senator Jay Costa*

/s/ John S. Summers
John S. Summers

EXHIBIT 1



THE SUPREME COURT OF PENNSYLVANIA

Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 9200
P.O. Box 62025
Harrisburg, PA 17106-2025

P. KEVIN BROBSON
JUSTICE

December 4, 2023

Counsel of Record:

RE: Krasner v. Senator Kim Ward, et al.
Nos. 2-4 EAP 2023; J-65A-C-2023
No. 5 EAP 2023 (Submitted on Briefs)

During argument in the above-referenced matter, Attorney Robert Graci appeared and argued on behalf of Representatives Timothy R. Bonner and Craig Williams. I was not previously aware of Mr. Graci's involvement in this case, as his name does not appear on the briefs for these participants.

It is a matter of public record that Mr. Graci served as the treasurer for my authorized campaign committee for the Pennsylvania Supreme Court election in 2021. In addition, Mr. Graci represented me in a personal matter that lasted 6 months, concluding in June 2022. I do not believe Mr. Graci's prior involvement in my 2021 campaign or my past engagement of him for personal professional legal services presents a disqualifying circumstance under the Pennsylvania Code of Judicial Conduct.

I, therefore, intend to participate in the consideration and decision of the above matter impartially and objectively, just as I do in all cases. Nonetheless, should any party wish to file a timely motion in light of the above disclosure, I will afford it appropriate consideration.

Very truly yours,

P. Kevin Brobson

cc: Kaitlin Gorman, Prothonotary (for distribution)
All Justices

EXHIBIT 2

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

2 EAP 2023

LARRY KRASNER, in his official capacity as the District Attorney of
Philadelphia;

Appellant,

v.

SENATOR KIM WARD, in her official capacity as Interim President Pro
Tempore of the Senate; REPRESENTATIVE TIMOTHY R. BONNER, in his
official capacity as an impeachment manager; REPRESENTATIVE CRAIG
WILLIAMS, in his official capacity as an impeachment manager;
REPRESENTATIVE JARED SOLOMON, in his official capacity as an
impeachment manager; and JOHN DOES, in their official capacities as
members of the SENATE IMPEACHMENT
COMMITTEE;

Appellees.

ENTRY OF APPEARANCE

Kindly enter the appearance of Robert A. Graci, Esquire, on behalf of
Appellees Representatives Timothy R. Bonner and Craig Williams. All
papers should be served at 4250 Crums Mill Road, Suite 201, Harrisburg,
Pennsylvania, 17112.

SAXTON & STUMP

Dated: October 10, 2023

By:



Robert A. Graci (ID No. 26722)
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rag@saxtonstump.com

*Counsel for Appellees
Representatives Bonner and Williams*

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case
Records Public Access Policy of the Unified Judicial System of
Pennsylvania that require filing confidential information and documents
differently than non-confidential information and documents.



Signature: _____

Name: Robert A. Graci

Attorney No.: 26722

IN THE SUPREME COURT OF PENNSYLVANIA

Larry Krasner, in his official capacity as the District Attorney of Philadelphia : 2 EAP 2023
:
:

v.
Senator Kim Ward, in her official capacity as President Pro Tempore of the Senate; Representative Timothy R. Bonner, in his official capacity as an impeachment manager; Representative Craig Williams, in his official capacity as an impeachment manager; Representative Jared Solomon, in his official capacity as an impeachment manager; and John Does, in their official capacities as members of the Senate Impeachment Committee

Appeal of: Representative Timothy R. Bonner and Representative Craig Williams

PROOF OF SERVICE

I hereby certify that this 10th day of October, 2023, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Service

Served: Andrew Martin Erdlen
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IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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IN THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

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Phone: 267-443-4142
Representing: Appellee Kim Ward

IN THE SUPREME COURT OF PENNSYLVANIA

/s/ Robert A. Graci

(Signature of Person Serving)

Person Serving: Graci, Robert A.
Attorney Registration No: 026722
Law Firm: Saxton & Stump
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Representing: Appellant Bonner, Timothy R.
Appellant Williams, Craig

EXHIBIT 3

In Re: Krasner, L v. Senator Kim Ward, Apl.
4 EAP 2023

NOTICE

By obtaining an argument date, and by appearing of record in this Court, counsel scheduled to make argument recognizes the Court's investment of time and resources in preparation, and represents that he/she will in fact appear (or will secure substitute counsel) on the date designated below. Motions for Continuance are disfavored, and must be brought at the earliest opportunity. Such Motions shall be verified, and shall set forth in detail the unforeseen circumstances necessitating a continuance.

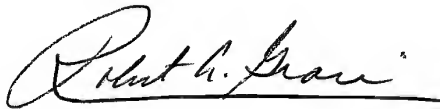
Letter to: Robert A. Graci, Esq.

Counsel For: Williams, Craig - Appellee

Counsel For: Bonner, Timothy R. - Appellee

Argument Scheduled For: November 28, 2023 9 00 am.

Acknowledgement of Notice of Date and Time of Argument (to be returned):



Signature*

10-9-2023

Date

Robert A. Graci

Printed Name

rag@saxtonstump.com

E-Mail

*By returning this form I acknowledge that I have reviewed the Supreme Court's protocols regarding continuances and oral argument and intend to argue on behalf of my client.

Note After you submit this form, if different counsel for your client wishes to argue instead, they should enter their appearance, if necessary, and submit an acknowledgment to the Prothonotary's office without delay.